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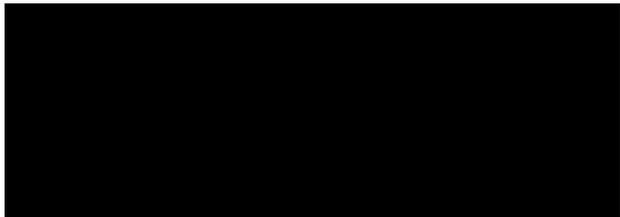
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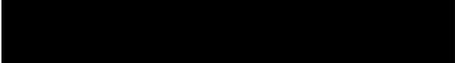


U.S. Citizenship
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Services

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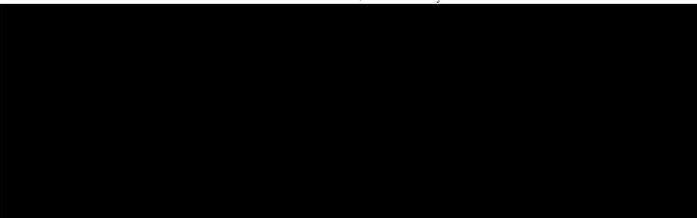


FILE: EAC 03 051 55041 Office: VERMONT SERVICE CENTER Date: **SEP 30 2004**

IN RE: Petitioner: 
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner engages in kitchen construction, sales, and installation. It seeks to employ the beneficiary as an installation manager. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel states that the proffered position qualifies as a specialty occupation.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the

director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an installation manager. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail directing the installation of all appliances, furniture, cabinets, and countertops; ensuring timely completion of projects; reviewing and analyzing work plans; hiring, assigning duties, and supervising staff; negotiating contracts; representing the company before banks and government bodies; using [REDACTED] preparing and interpreting construction drawings and managing the conversion of the decimal metric system; and having responsibility for profitability. The petitioner's November 15, 2002 letter stated that a candidate for the proffered position must possess a bachelor's degree in architecture, industrial or commercial interior design, or a related field, or possess the equivalent experience.

The director determined that the proffered position was not a specialty occupation. Referring to the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), the director stated that it concurred with the petitioner's claim that the duties of the proffered position are performed by a construction manager. Nonetheless, the director found that the *Handbook* reports that employers do not require a bachelor's degree for entry into a construction manager position. The submitted job postings did not convince the director of an industry standard that required candidates to possess a bachelor's degree. The director noted that the job postings indicated neither the size of the companies seeking candidates nor the specific duties of the jobs. Finally, the director found the submitted evidence about the University of Virginia's architecture program did not establish a specific degree requirement for entry into the proffered position.

On appeal, counsel states that the proffered position is closely related to a construction manager, but it is not identical. The proffered position, counsel claims, has more specialized and complex duties, requiring a bachelor's degree in architecture, industrial or commercial interior design, or in a related field, or the equivalent experience. According to counsel, a candidate must possess the skills of a designer and architect. Counsel stresses that the beneficiary will manage 31 employees, and states that the beneficiary will be:

[D]eveloping materials for use in homes, and will manage the production of marble, granite, and quartz tops in all forms, under plans developed for each project by architects or engineers.

Counsel also stated that the beneficiary will ensure that the petitioner is "manufacturing the best products." Counsel emphasizes that the petitioner specializes in European kitchens and that the need for the proffered position arose because the petitioner signed a services agreement with Home Depot to install kitchens and granite and marble surfaces. Counsel describes the relationship between the skills required for the installation manager and the coursework in the University of Virginia's program in architecture. Counsel narrates the time the beneficiary will spend performing each duty: 20 percent – designing; 50 percent – supervising

projects; 20 percent – quality control; 5 percent – managing personnel; and 5 percent – representing the company. According to counsel, the job postings for construction managers and related positions indicate that employers often require a bachelor's degree in construction management, architecture, engineering, or interior design. Counsel avers that some of the postings are similar to the proffered position. Finally, counsel contends that because the beneficiary will perform the duties of an architect, the proffered position is in the architectural field, thereby qualifying as a specialty occupation under the Act.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO notes an inconsistency exists between the beneficiary's proposed duties and the terms of the contract with Home Depot. On appeal, counsel emphasizes that the petitioner needs the services of an installation manager because it signed a services agreement with Home Depot to install kitchens and granite and marble surfaces. In the March 7, 2003 letter, the petitioner indicated that the beneficiary will provide:

Control and supervision of designs, coordination and training of designers regarding construction changes, electric, water and gas issues, tendencies, materials, construction methods, systems, and evaluation and implementation.

In the appeal brief, counsel contends the beneficiary will:

[E]valuate the design, quality, and color of European materials for kitchen construction, including hardware, laminates, wood, marble, granite and quartz in order to meet the customer's requirements.

The petitioner's contract with Home Depot stated that the petitioner will install cabinets; it never indicated that the beneficiary will design cabinets. The AAO finds that the quoted passage from the March 7, 2003 letter is vague: it may relate to the actual design of kitchen cabinets, the installation of cabinets in accordance to a design provided to the beneficiary, or the layout of the cabinets according to the beneficiary's design or a design supervised by the beneficiary, or all three.

The quoted passage from the appeal brief implies that the beneficiary will “evaluate” a design. Yet, the contract with Home Depot does not indicate that the petitioner has this obligation. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, the passage quoted from the appeal brief carries diminished weight because it is inconsistent with the terms of the “Installer Agreement” with Home Depot, which counsel claims is the reason the petitioner seeks the services of an installation manager.

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

A careful review of the *Handbook* discloses that the duties of the proffered position are an amalgam of those performed by a drafter and a first-line supervisor/manager of construction trade workers such as carpenters and tile installers, tilesetters, and marble setters. Drafters are described as preparing technical drawings and plans used by production and construction workers to build everything from manufactured products, such as industrial machinery, and spacecraft, to structures, such as houses. Drafters use technical handbooks, tables, calculators, and computers to complete their work. Similar to the beneficiary who will “work effectively with the architects and designers involved in the projects,” and will obtain “all necessary permits and licenses” and, if necessary, “direct or monitor compliance with building and safety codes and other regulations,” drafters fill in technical details, using specifications, codes, drawings, sketches, and calculations previously made by engineers and architects. The *Handbook* states “their drawings provide visual guidelines, show the technical details of the products and structures, and specify dimensions, materials, and procedures.” The *Handbook* mentions that drafters use computer-aided design (CADD) and drafting systems to prepare drawings.

The petitioner stated that the beneficiary will direct the installation of all appliances, furniture, cabinets, and countertops. According to the *Handbook*, a supervisor/manager of construction trade workers directly supervises and coordinates the activities of construction trade workers. Carpenters are described as hanging kitchen cabinets; working from blueprints or instructions from supervisors; measuring, marking, and arranging materials; cutting and shaping wood and joining materials; and checking the accuracy of work. Tile installers, tilesetters, and marble setters are depicted as applying hard tile and marble to surfaces such as walls, ceilings, floors, and roof decks.

According to the *Handbook*, employers do not require either first-line supervisors/managers of construction trade workers or drafters to possess a bachelor's degree. Accordingly, the petitioner cannot establish that a

baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - the petitioner submitted job postings. The postings are not persuasive in establishing the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). Nearly all of the companies in the postings provide a far more extensive scope of service compared to the petitioning entity, an installer of kitchen cabinets and countertops. The company located in [REDACTED] specializes in construction management for tenant improvement projects; Construction [REDACTED] provides construction management services; Aaron's Sales and Leasing retails furniture, appliances, electronics, and computers; and Centrex Homes is a home builder. Only one posting, for a sheet metal installation company, is similar in scope to the petitioner. Nevertheless, this company does not require candidates to possess a bachelor's degree in architecture, industrial or commercial interior design, or a related field; it merely prefers candidates possessing a bachelor's degree with a mechanical emphasis. The AAO notes that the postings from Construction [REDACTED] the company located in Indianapolis, Indiana, and the company located in Saint Louis, Missouri, do not specify job duties. Based on the above analysis, the petitioner fails to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree. Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. As previously discussed, the *Handbook* reveals that the duties of drafter and first-line supervisor/manager of construction trade workers are similar to the duties of the proffered position, and that employers do not require a bachelor's degree for drafter and first-line supervisor/manager positions. Therefore, the petitioner fails in establishing the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The evidence about the University of Virginia's program in architecture is irrelevant in establishing that the proffered position is a specialty occupation. A university may offer a particular degree program. But this does not establish an employer's educational requirements.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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ORDER: The appeal is dismissed. The petition is denied.